No. 852

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JOHN F. DAVIS, CL

In The
Supreme Court of the United States
OCTOBER TERM, 1966

SAFEWAY STORES, INCORPORATED, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE ARGUS PRESS SEATTLE, WASHINGTON

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No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed in the above entitled case on November 23, 1966.

A. Citations to Opinion Below.

The opinion of the Court of Appeals filed September 14, 1966 is as yet unreported and is printed as Appendix A hereto.

B. Jurisdiction.

The opinion of the Court of Appeals was filed on September 14, 1966. A petition for rehearing en banc timely filed by this petitioner was denied on October 25, 1966. The judgment of the Court below was filed November 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) and 15 U.S.C. Section 45 (c).

C. Questions Presented.

1. Does the taking of "official notice" by an administrative agency of extended facts essential to establish its case against a respondent which were developed from a prior adjudicatory record based on testimonial and documentary evidence in a prior proceeding to which that respondent was not a party (a) violate Sections 7 (c) and (d) of the Administrative Procedure Act, 5 U.S.C. § 1006 (c) and (d), or (b) deny such respondent procedural due process of law in violation of the 5th Amendment to the United States Constitution.

2. Where such respondent has declined to request a reopening of proceedings and has not attempted to disprove or show the contrary of essential facts so officially noticed by the agency, has that respondent waived objection to the scope of "official notice"

authorized by Section 7 (d) of the Administrative Procedure Act (5 U.S.C. § 1006 (d)).

D. Constitutional and Statutory Provisions and Regulations Involved.

(1) Constitutional provisions involved are the provisions of the 5th Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis added)

(2) Statutory provisions involved are Sections 7 (c) and 7 (d) of the Administrative Procedure Act, 5 U.S.C. Sections 1006 (c) and 1006 (d):

> "(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and

in accordance with the reliable, probative, and substantial evidence. *Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.* In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (Emphasis added)

"(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. *Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.*" (Emphasis added)

(3) Regulations involved are Rule 3.14 (d) Federal Trade Commission Rules of Practice for Adjudicative Proceedings. 16 CFR (Supp. 1965) § 3.14 (d):

"*Official notice of facts.* When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."

E. Statement of the Case:

The Federal Trade Commission, herein called Commission, served its complaint alleging price fixing

activities in the sale of bread in violation of 15 U.S.C. § 45. Named as respondents were a trade association, its officers and members and two non-members including Safeway Stores, Incorporated, petitioner herein. The Commission in its opinion dated February 28, 1964 rejected the contentions of all respondents that, assuming the Commission had established the acts and practices alleged,[1] they were not "in commerce" within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. To sustain this position, the Commission, relying upon *United States vs. South-Eastern Underwriters Assn.*, 322 U.S. 533, found that by reason of the integrated nature of the operations of respondent Continental Baking Company "all of Continental's sales in the State of Washington were 'in' interstate commerce." (Tr. Vol. Three, p. 836). This finding was expressly based upon the taking of "official notice" by the Commission of extensive facts relating to the nature and extent of Continental's operations "developed" from "an adjudicatory record that explored the structure and operation of Continental's business" through "documentary evidence secured from Continental, and by examination and cross-examination of

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[1]With respect to petitioner Safeway such a finding rests upon the proposition accepted by the Court below that the Commission could "infer" that Safeway participated in conspiratorial activity because it retained the secretary of the trade association to represent Safeway in labor negotiations, the secretary having been shown to have engaged in price fixing activities without Safeway's knowledge or consent.

Continental's officials and employees" (Tr. Vol. Three, p. 829-830). Safeway was not a party to the referenced proceedings of the Commission in its Docket No. 7630 entitled "In the Matter of Continental Baking Company," in which Continental was charged on October 27, 1959 with violating Sections 2(a) and 2(d) of the Clayton Act, as amended, by granting discriminatory price concessions and promotional allowances. (See Appendix D)

Upon the basis of its opinion dated February 28, 1964 the Commission issued its "Final Order" against Safeway as of the same date, (Tr. Vol. Three, p. 816), which opinion and order were served on Safeway on April 7, 1964.

Safeway thereupon filed its "Petition for Review and Decree Setting Aside Order of the Federal Trade Commission" (Tr. Vol. Ten, p. 1142) and perfected its appeal to the Court below from the Final Order of the Commission dated February 28, 1964.

Although the effective date of this "Final Order" was stayed by subsequent order of the Commission dated May 28, 1964 (Tr. Vol. Three, p. 882) pending consideration of a petition by Continental (Tr. Vol. Three, p. 873) for a reopening of proceedings to show the contrary of facts officially noticed in the Commission's decision of February 28, 1964, this order of February 28, 1964 was not vacated and re-

mains the effective order of the Commission against Safeway.

Safeway did not petition the Commission for a reopening of proceedings to disprove or show the contrary of the facts "officially noticed" regarding Continental in the Commission's opinion of February 28, 1964.

Following further hearing upon Continental's petition for reopening, the Commission as of December 3, 1964 made effective its order to cease and desist issued February 28, 1964. (Tr. Vol. Three, p. 983). To protect its record, Safeway filed a Supplemental Petition for Review incorporating by reference its Petition for Review heretofore filed and requested the court below to set aside both orders. (Tr. Vol. Ten, p. 1160). Among the grounds asserted upon which relief below was sought, Safeway asserted:

> "The Commission's order is based upon its opinion which attempts to incorporate and import the record and findings of another adjudicatory proceeding to which Petitioner was not a party under the guise of taking official notice of a material fact not appearing in the evidence in the record in violation of Section 7(d) of the Administrative Procedure Act, 5 U.S.C. 1006(d). If Section 7(d) of the Administrative Procedure Act is construed as contended by the Commission to authorize the incorporation and importation into this record of the entire record and findings of another adjudicatory proceeding to which Petitioner was not a party, then Petitioner has been deprived of property without due process of law

in violation of the provisions of the Fifth Amendment to the Constitution of the United States:" (Tr. Vol. Ten, pp. 1145-6 and 1162-3)

F. Jurisdiction of the Court Below.

Jurisdiction of the Court below was invoked under Section 5(c) of the Federal Trade Commission Act, Title 15 U.S.C. Section 45(c).

G. Reasons for the Allowance of the Writ.

1. The decision of the Court below is squarely in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Dayco Corporation v. Federal Trade Commission* 362 F.(2d) 180 decided June 17, 1966.

So far as petitioner is advised these two decisions are the only decided cases dealing with the questions presented by this petition. *Dayco* answered in the affirmative both subparts (a) and (b) of Question No. 1, set forth above under "Questions Presented", supra page 2, and answered Question No. 2 in the negative. A contrary conclusion was reached by the Court below on both questions.

The Federal Trade Commission, respondent here, conceded in *Dayco* that "no decision heretofore announced is in point" (362 F.(2d) at 185).

2. The significance of a definite answer to the questions presented by this petition in the field of admin-

istrative law is apparent. Not only do they involve substantial questions of agency practice by the Federal Trade Commission but all other agencies governed by the Administrative Procedure Act. Additionally, the constitutional question presented in a determination of the proper scope of "official notice" in administrative proceedings has potential impact not only upon federal agency practice but upon the increasingly expanding field of state and local administrative practice as well.

The Court of Appeals for the Sixth Circuit in *Dayco* refused to expand the concept of "official notice" in the manner urged by the Commission which it has persuaded the Court below to approve. Recognizing the far reaching implications inhering in taking official notice of facts litigated in prior cases Judge O'Sullivan wrote in *Dayco* (362 F.(2d) at 185):

> "The FTC concedes that no decision heretofore announced is in point.
>
> 'There do not appear to be any cases in which courts have explicitly determined whether notice may be taken of facts litigated in prior cases involving other parties, where the parties in the current case contest the facts or the court's action in taking judicial notice.' (Opinion of the Commission)
>
> "(2) In their address to us, the *FTC* counsel invite us to move official notice to new ground. Recognizing an exception to the hearsay rule by use of prior testimony, 'in later trials if there is *an identity of parties,*' it observes that 'there

> is a developing trend to widen the exception,' and *ask us to adopt a rule which would allow the FTC to make out a case against the first of several accused,* and *then simply rest upon that case in subsequent proceedings against different parties.* We decline to move to the new ground suggested, not out of timidity but because *to do so would, in our view, do violence to fair play and due process.*" (Emphasis added)

A determination of the propriety or "procedural impropriety of the Commission's use of official notice as a substitute for proof," in the words of *Dayco,* is we submit in the public interest and is of substantial importance in determining the practice by and before all administrative agencies.

3. Petitioner submits that the disposition of the Questions Presented (supra page 2) by the decision of the Court below was erroneous and that the answers to these questions given by the Court of Appeals for the Sixth Circuit in *Dayco* were and are correct.

Dealing with a record, the substantial totality of which dealt with acts and practices within the State of Washington and the sale of bread within the State by all respondents, the Commission in this proceeding sought to evade the impact of *Federal Trade Commission v. Bunte Bros. Inc.,* 312 U.S. 349 (1941) holding that acts and practices within the purview of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 must be "in" and not merely "affect" interstate commerce. In so doing the Commission found that

all operations and sales by respondent Continental Baking Company were "in" interstate commerce by reason of the integrated structure and operation of Continental's business and thus concluded that the acts and practices complained of were "in" interstate commerce.[2]

These findings as to the structure and operation of Continental's business were accomplished as stated by the Court below by "taking official notice and incorporating in the record findings of another Commission proceeding, *In re Continental Baking Co.*, Docket 7630, October 27, 1959" (Appendix A, page A-17). Some half dozen pages of "developed" facts under fifteen different headings were thus "officially noticed" (Tr. Vol. Three, pp. 829-836).[3]

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[2]The opinion of the Court below (Appendix A, page A-20) suggests that these findings were supportive only of an alternative basis of jurisdiction in that the record disclosed minimal sales to Alaskan customers at dockside in Seattle which could properly establish the jurisdiction of the Commission. The Commission plainly rejected any such suggestion that its jurisdiction rested upon Alaskan sales by respondents or any of them and the case was tried upon no such theory. The Commission stated "this case involves a much larger problem" (Tr. Vol. Three, p. 821) and rested its jurisdiction upon the nature of the structure and operations of Continental (Tr. II, Vol. Three, pp. 836-838) and fashioned its cease and desist order upon the basis of this conclusion.

Questions as to the validity of any such suggested alternative basis of jurisdiction are not the subject of this petition but are presented by and considered in the Petition for Certiorari filed by Continental which is adopted and concurred in by this petitioner. See p. 14 *infra*.

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[3]The testimony of which the Comimssion took "official notice" did not even have the dignity of having been adopted by the Commission in Docket No. 7630, nor had the Commission ever made findings of fact on the matters which it purported to "officially notice". The testimony noticed was chiefly that of one individual – the Regional Manager for Continental's New York region.

Safeway was not a party to the Commission's Docket No. 7630 and had no opportunity to cross-examine the witnesses sworn, or otherwise test the validity of the evidence adduced some years before.

Whatever may be the permissible limits of "official notice" by administrative agencies in terms of "legislative facts" or facts resting upon the "accumulated knowledge" or the "experience or expertise" of an administrative agency, it is clear, as stated in *Dayco,* that the concept of "official notice" recognized in Section 7 (d) of the Administrative Procedure Act does not extend to notice of "adjudicative facts" which rest upon the testimony of individual witnesses in a particular case. See *Dayco Corporation v. FTC,* 362 F.(2d) 180 at 186; Davis, "Official Notice" 62 Harv. L. Rev. 537; Cooper, State Administrative Law, Vol 1, p. 413.

To construe Section 7 (d) of the Administrative Procedure Act as authorizing official notice of the matters embraced in the opinion of the Commission herein would be inconsistent with the provisions of Section 7 (c) of the Act which require that:

> "*Every party shall have the right to present his case* or defense by oral or documentary evidence, to submit rebuttal evidence, *and to conduct such cross examination as may be required* for a full and true disclosure of the facts." (Emphasis added)

To permit an administrative agency to establish facts in one proceeding against certain respondents, which facts might or might not be resisted or established properly for one reason or another, and import them into another proceeding would, as stated in *Dayco,* "do violence to fair play and due process" (362 F.(2d) at 185).

Whether or not such facts may or may not be correct is beside the point. The prejudice to Safeway here results from the denial of its procedural rights and not necessarily from the use of untrustworthy evidence. See *U.S. v. Abilene & Southern Ry Co.,* 265 U.S. 274 (1924); see also *Kline v. United States,* 41 F Supp. 577, (DC Neb. 1941). The flaw lies not in the quality of the evidence — it is in the quality of the hearing. It was "the procedural impropriety of the Commission's use of official notice as a substitute for proof" which required the vacation of the Commission's order in *Dayco.* (362 F.(2d) at 187).

Quoting Section 7 (d) of the Administrative Procedure Act, the Court below held that petitioner, not having availed itself of the opportunity and not having attempted to show the contrary of the matter officially noticed "must be held to have waived objections" (Appendix A, page 18).

The folly and illusory nature of any opportunity to rebut adjudicative facts erected years ago on the

basis of testimony of individual witnesses in a particular prior case to which petitioner was not a party is apparent. *Dayco* refused to permit such a process even though the two proceedings in question appear to have been simultaneously filed (362 F.(2d) 180 at 184-185).

The question of waiver is placed in proper perspective, however, by the decision in *Dayco* which states:

> "The section, however, attempts no definition of 'official notice' and a litigant need not undertake to use his 'opportunity to show the contrary' until official notice has been *properly employed.*" (362 F.(2d) at 185). (Emphasis added)

Petitioner further submits that it cannot be deemed to have waived a failure by the Commission to accord it procedural due process of law.

H. Opinions Below.

The Opinion of the Court of Appeals for the Ninth Circuit is set forth in Appendix A.

The Opinion of the Commission and Final Order of the Federal Trade Commission dated February 28, 1964 and served on petitioner on April 7, 1964, including the dissenting opinion of Commissioner Philip Elman, are set forth in Appendix B.

The Opinion after Reopening and Final Order of the Federal Trade Commission dated December 3,

1964 and served on petitioner on December 14, 1964 are set forth in Appendix C.

The Opinion of the Federal Trade Commission in its Docket No. 7630 dated December 31, 1963, testimony in which the Commission purports to "officially notice" in its opinions set forth in Appendices B and C, is set forth in Appendix D.

The Opinion of the Court of Appeals for the Sixth Circuit in *Dayco Corporation v. F.T.C.*, 362 F.(2d) 180, with which the opinion of the court below is in conflict is set forth in Appendix E.

I. Judgment of the Court Below.

The judgment of the court below is set forth in Appendix F.

Concurrence in Petition for Writ of Certiorari of Continental Baking Company

Consistent with the provisions of Rule 23(5), Supreme Court Rules, and in order to avoid duplication, petitioner does hereby adopt and subscribe to the Petition for Writ of Certiorari filed or to be filed in this Court by Continental Baking Company for review of the judgment sought to be reviewed by this petition.

The Petition for Writ of Certiorari filed or to be filed by Continental presents additional and different questions from those presented by this petition and this petitioner desires to join in the presentation of such questions and does by this reference incorporate as though herein fully set forth the Petition for Writ of Certiorari filed or to be filed herein by Continental Baking Company.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that I am a member of the Bar of this Court representing Safeway Stores, Incorporated in behalf of whom service of the foregoing Petition for Writ of Certiorari has this day been made pursuant to Rule 33, Supreme Court Rules, by depositing the same in a United States mail box with air mail postage prepaid to the following:

Federal Trade Commission
Washington, D. C., 20580

J. B. Truly
Assistant General Counsel
Federal Trade Commission
Washington, D. C., 20580

The Solicitor General
Department of Justice
Washington 25, D. C.

Dated December ....., 1966.

.....

ROBERT W. GRAHAM